

October 2013

CBI COMMENTS ON THE OECD WHITE PAPER ON TRANSFER PRICING DOCUMENTATION

- 1 The CBI welcomes the opportunity to comment on the OECD White Paper on Transfer Pricing Documentation issued on 30 July (referred to as the “White Paper” or “TPD” in this document). We will also use the term “transfer pricing documentation” generally and the term “TPRA” to refer to the OECD Draft Handbook on Transfer Pricing Risk Assessment issued in April or refer to transfer pricing risk assessment in general, as the context requires.
- 2 The CBI notes that we have been privy to the BIAC comments on the White Paper and endorse them. In addition, below we make some points of emphasis on matters which are of particular concern to business actives in the UK, be they inbound or outbound investors. We recognise that there is still further work to be done and we have refrained from providing detailed comments on every aspect of the White Paper. Instead, we have highlighted some key areas where more thought needs to be given before final TPD proposals can be developed.
- 3 As the UK’s leading business organisation, the CBI speaks for some 240,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

Comments on the intent and purpose of the White Paper

- 4 The CBI welcomes the intent of the paper to provide a simple and effective TPD framework. This has long been the desire of the British businesses and the UK tax authorities. We fully support any initiative that achieves this for multinationals operating more across different countries.
- 5 The CBI also applauds the analysis of the current law and practice internationally in the White Paper. In particular, it demonstrates the urgent need for more consistency and targeted purpose for the plethora of TPD and TPRA approaches for businesses operating cross-border. The diversity of different laws and practices internationally add to a significant compliance burden for businesses with seemingly little purpose.
- 6 We also agree with the analysis and conclusions drawn in Sections II and II of the White Paper. These will provide a solid rationale for agreeing a workable structure for TPD and TPRA going forward. The Consolidated Approach to Documentation (“CAD”) set out in Section V, accommodating the Section IV tiered approach building up from TPRA through to full auditable documentation, is a logical approach.

The attraction of CAD as currently drafted

- 7 The CBI remains unconvinced that the limited take up of the EU Guidance on TPD that the White Paper observes will not repeat with CAD, for the same reasons as are given in the document in the context of



the EU TPD Guidance (paragraph 28). To avoid such limited take up risk, there needs to be a clear incentive beyond a simple penalty protection (already a feature of existing TPD approaches around the world).

- 8 Of particular importance will be a clear and rewarded linkage between TPD and TPRA. In this regard, we believe that the White Paper requires further thinking and the CBI would welcome an opportunity to further engage to make that linkage work sensibly. We highlight this particular point as it goes beyond the reward of penalty protection noted in the third bullet point of paragraph 83 of the White Paper.
- 9 One such element of “reward” might be a reflection in TPRA and a consequential reduction of TPD burden. This supports a three tier approach to TPD as propounded by other commentators on the White paper, as it would allow TPRA to influence the next two stages (masterfile and then local file). However, we acknowledge that there is a “cart before the horse” issue to be resolved here – a business may still need to produce the full masterfile and local files in order to demonstrate a track record of low risk. Nonetheless, the benefit of a low TPRA could be reflected in a reduced maintenance requirement in future years.
- 10 Further work will be required for CAD to achieve the objectives set out in the White Paper. This is in addition to finding the right incentive to guarantee the take up of the CAD principle.

“Levelling up” prevention

- 11 Thought needs to be given to how the tendency to “levelling up” in local transfer pricing rules can be avoided. A masterfile/local file disclosure requirement may actually result in an increased compliance burden, with a risk that local transfer pricing rules could add further disclosure requirements. In the CBI’s view, and consistently with a more effective arbitration and mutual agreement process envisaged in the BEPS Action Plan (Action 14), there is an opportunity for a similar form of estoppel of a single tax authority overriding the White Paper proposals through an agreed coordinated approach between the tax authorities concerned. We would welcome further discussion on how this might be achieved.

Issues with CAD – Masterfile approach

- 12 The CBI notes that there are a number of issues with the CAD – masterfile approach as currently set out on pages 23 and 24 of the White Paper.
- 13 We are concerned that the current content seems to be a confused mix of the risk assessment data and detailed transfer pricing functional analysis. In our view, the masterfile should include high level data describing the business with key risk assessment information. The masterfile should not be a detailed functional analysis of all group activities.

Country-by-Country reporting

- 14 We understand that country-by-country reporting has been mandated by the G8 and the G20, and, therefore, some form of reporting is likely to be required. We also understand that the purpose of this reporting is to provide tax authorities with appropriate information to enable them to perform high level TPRA. The CBI welcomes this initiative so long as it does not introduce undue and disproportionate additional compliance burden on businesses and so long as any new requirements are necessary for the purpose of TPRA.
- 15 In some circumstances, the objectives of the required country-by-country reporting could be achieved by using data that businesses already collect, rather than requiring new forms of data. However, this is not the case with all business models. Providing certain information (such as profit numbers by country) will require additional data analysis outside of what is already performed for some businesses, so we would encourage early dialogue in those cases especially.
- 16 Furthermore, we are concerned that “simple” data might be identified as helpful to the process, but, isolated from contextual discussion, this data could easily lead to incorrect conclusions. At the very least, clear benchmarks would need to be developed to ensure the data is not misinterpreted when viewed out of context of applicable business models.

- 17 The practical and conceptual challenges which need to be overcome in order to design and implement proportionate and constructive requirements should be considered. For example, some jurisdictions (e.g. China, Saudi Arabia and Egypt) levy tax on earnings of permanent establishments on a 'deemed profit' basis because they recognise that it is disproportionately difficult to arrive at and audit an actual profit for such permanent establishments. Imposing a requirement to produce profit figures in such circumstances (where there is no other accounting or tax requirement) may create a disproportionate burden and could provide limited benefit for TPRA purposes.
- 18 The CBI considers that the collection and provision of country-by-country information is not directly connected with transfer pricing, as it is not sufficient in and of itself to determine whether transfer pricing guidelines have been appropriately applied. However, if this data is used as a TPRA tool to allow tax authorities to form a better understanding of where income is earned, this will allow them to more tightly focus subsequent TPD requests.
- 19 The CBI would welcome an opportunity to develop appropriate and workable solutions which are consistent with the aim of the White Paper to identify a simple and effective approach to TPD fully endorsed by all stakeholders.